90-954

No. 90- .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should requests to modify consent decrees which govern the administration of important public institutions such as jails or prisons be subject to the "grievous wrong" standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the "flexible standard" adopted by the majority of the Circuit Courts of Appeals, or a new standard articulated by the First Circuit in this case that is even more stringent than the "grievous wrong" standard?

PARTIES TO THE PROCEEDINGS

The petitioner, Robert C. Rufo, the current Sheriff of Suffolk County, substitutes for the former Sheriff, Dennis J. Kearney. In addition to the parties listed in the caption, The Mayor of the City of Boston is a petitioner. The City Council of the City of Boston, a party in the case below, is an inactive party before this Court. The following are additional respondents:

Commissioner of Correction of the Commonwealth of Massachusetts;
Deputy Commissioner of Capital Planning and Operations of the Commonwealth of Massachusetts;
Secretary of Administration and Finance of the Commonwealth of Massachusetts.

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (cont.)

Constitutional Provisions:

Federal Statutes and Rules:

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PETITION FOR WRIT OF CERTIORARI

Robert C. Rufo, Sheriff of Suffolk County, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-2a) is unreported. The opinion of the District Court (App. 5a-14a) is reported at 734 F.Supp. 561 (D. Mass. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1990. App. 3a-4a. The Court of Appeals affirmed the District Court's denial of the petitioner's request to modify a consent decree. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Sections 1 and 5 to the Constitution of the United States provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .

> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

This action was initiated in the United States District Court for the District of Massachusetts in 1971, on behalf of the inmates of the Suffolk County Jail, Boston, Massachusetts. (Suffolk County consists of the City of Boston and the neighboring cities of Chelsea, Revere and Winthrop.) At that time, the Suffolk County Jail was located on Charles Street in the City of Boston and was known as the "Charles Street Jail." The inmates alleged that the conditions of their confinement violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Due Process clause of the Fourteenth Amendment. The action arose under 42 U.S.C. § 1983, and jurisdiction of the District Court was based on 28 U.S.C. § 1343(3), and (4).

On June 20, 1973, the Court issued an opinion and final judgment permanently enjoining the Sheriff "from housing at the Charles Street Jail after November 30, 1973, in a cell with another inmate, any inmate who is awaiting trial" (hereinafter "double-bunking"). App. 48a. In addition, the District Court ordered that the construction of a new Suffolk County Jail be completed by 1976.

To comply with the Court's order, the parties entered into a consent decree ("Consent Decree") in 1979 to build a new high-rise Suffolk County Jail adjacent to the Charles Street Jail. App. 15a-22a. The Consent Decree does not include in its statement of purpose a prohibition against double-bunking. Instead, the Consent Decree recites as its purpose the defendants' "desire to fulfill their duties under state and federal law

to provide, maintain and operate as applicable *a suitable and constitutional jail* for Suffolk County pretrial detainees." App. 15a. (Emphasis added.) The Consent Decree incorporates the "Suffolk County Detention Center, Charles Street facility, Architectural Program" ("Architectural Program"). The Architectural Program, a one hundred ten page document, describes the functional spaces to be included in a new Suffolk County Jail, including what are described as "single-occupancy rooms."

As originally planned, the new Suffolk County Jail had 309 "rooms" (cells). The number of cells was based upon population projections prepared by the accounting firm of Peat, Marwick and Mitchell. Integral to the planning of the capacity of the new jail, those projections showed that the pretrial detainee population would decline throughout the 1990's and would be less than 230 by 1990. Thus, the Consent Decree was signed under the assumption of a *declining* pretrial detainee population. Those projections, however, have now proven to be wholly inaccurate.

By 1984, a new jail had still not been built. In October of that year, the Sheriff brought suit in the Supreme Judicial Court of Massachusetts against the Mayor and the City Council of the City of Boston, who collectively are the Suffolk County Commissioners, to compel the construction of a new Suffolk County Jail. Suit was brought exclusively under state law. Orders entered in that state case, and a companion case filed by the Attorney General of the Commonwealth of Massachusetts compelled the Mayor and the City Council to construct a new Suffolk County Jail. *Attorney General* v. *Sheriff of Suffolk County*, 394 Mass. 624, 477 N.E.2d 361 (1985).

In 1985, the Sheriff requested, and the Federal District Court ordered, that the number of cells planned for the new Suffolk County Jail be increased to 435 (a 41% increase in the number of cells), consisting of 405 cells for male detainees and thirty

cells for female detainees. During 1985, the daily average number of male detainees committed to the Sheriff's custody ranged from a low of 284 to a high of 352, averaging 326 for the year, substantially less than the increased number of cells planned for the new jail.[1]

The daily average number of male detainees in 1986, 321, was lower than the 1985 average. In addition, the daily averages at the end of 1986 had declined or remained constant compared to the beginning of the year. Although the daily average increased somewhat in 1987 to 370, the numbers remained substantially less than the then-planned 405 cells for male inmates at the new jail. In sum, although by 1987 the pretrial detainee population exceeded the estimates in the Architectural Program, the number of cells planned in the new facility at that time substantially exceeded the average number of daily detainees for the prior two years.

Construction on the new jail to be located on Nashua Street (the "Nashua Street Jail") began in September, 1987. When the site of the new jail, originally planned for a site adjacent to the old jail at Charles Street, was moved to Nashua Street, the jail was redesigned from a high-rise to a seven story facility, and the number of cells increased from 435 to 453, consisting of a total of 413 cells for male detainees and forty cells for female detainees. The jail was completed in May, 1990, at a cost of fifty-four million dollars. It is one of the most modern facilities of its kind in the country.

Until late 1988, the number of pretrial detainees committed to the Sheriff's custody continued to be consistently below the Nashua Street Jail's capacity of 413 cells for male detainees. Only in July, 1988, well after construction was underway on the Nashua Street Jail, did the number of pretrial detainees exceed even 400 and begin to press against the number of cells

[1] The number of female detainees is small, and they can easily be accommodated in the cells designated for that purpose.

in the new jail. The Sheriff then filed his Motion to Modify the Consent Decree before the Federal District Court to allow double-bunking of 197 of the 413 cells for male detainees.

As provided for in the Architectural Program, the new Suffolk County Jail at Nashua Street includes a number of functionally distinct spaces, including 282 regular male housing cells divided into eight self-contained modular units. Each modular unit contains two tiers of sixteen to nineteen cells, a "dayroom", where meals are served and detainees may spend their out-of-cell time, a separate "quiet" or "multipurpose" room, counseling, noncontact visiting and attorney-client rooms, a washer and dryer for personal laundry (jail uniforms, bedding and towels are cleaned at a central laundry), a kitchenette for serving meals prepared in the central kitchen, two televisions, telephones for use by detainees and access to an outdoor recreation area shared with the adjoining modular unit.

In addition, as provided for in the Architectural Program, there are modular units for housing female detainees (40 cells), intake of male inmates before assignment to a housing unit (35 cells), administrative and disciplinary segregation (66 cells), protective custody (8 cells) and infirmary, psychiatric observation and suicide prevention (22 cells). The jail also contains, as provided for in the Architectural Program, a contact visiting area, a law library, a general library and classroom space for use by detainees. All areas of the jail are climate controlled. In contrast, the old Suffolk County Jail at Charles Street, aside from a few infirmary cells, contained none of these specialized modular units and spaces.

The number of cells to be double-bunked, 197, was chosen to insure a ratio of at least thirty-five square feet of common, out-of-cell area per detainee, as recommended by the American Correctional Association and to preserve the functioning of the various specialized cells. In addition, the Sheriff sought and received a ruling from the State Building Code Appeals Board that the Nashua Street Jail can safely hold 653 inmates.

Under the Sheriff's double-bunking proposal, detainees would be out of their cells twelve hours per day and would not be assigned to be double-bunked until they had been "classified" as suitable for double-bunking based upon a review of their medical, probation and jail records and their behavior while in custody. The Sheriff also agreed to continue the "Bail Appeal Project" under which attorneys who are employed by the Sheriff's Department and provided offices at the jail speedily process bail reviews to reduce the time a detainee is held before bail may be reduced on appeal.

In support of his motion, the Sheriff submitted voluminous evidence comprising some thirty-eight separate affidavits and twenty-four attached documents. This evidence included affidavits from the Sheriff; from other Sheriffs in Massachusetts, which described how they have successfully and safely double-bunked pretrial detainees for many years; from the Commissioner of Correction of Massachusetts, which described the overcapacity of the state and county correctional systems; from the Police Commissioner of the City of Boston and the District Attorney of Suffolk County, which described the unprecedented increase in arrests and prosecutions beginning in 1988, principally involving drugs; and from an outside consultant, who is both a Sheriff and an auditor for the American Correctional Association, who reviewed the Sheriff's double-bunking proposal and showed that the operation of the new Suffolk County Jail at Nashua Street with double-bunking is a vast improvement over the old jail, meets constitutional standards and meets almost all applicable ACA standards. The Sheriff also submitted statistical summaries showing the recent and unprecedented increase in pretrial detainees committed to the Sheriff's custody and the relatively rapid turnover in the detainee population that would limit the time any detainee would be double-bunked.

By double-bunking these cells, the Sheriff would not be compelled to transfer detainees to already overcrowded state and county facilities where inmates are double-bunked and would insure that he has the ability to hold all the detainees committed to his custody. The alternative to holding detainees at the Nashua Street Jail on the bail set by the court is to release them to unsecure "halfway" houses, from which ten percent of the detainees walk away, or to release them directly to the street.

In his request for modification, the Sheriff argued, *inter alia*, that: (1) this Court in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), had held that the Constitution did not prohibit double-bunking pretrial detainees; (2) double-bunking only 197 out of the 453 cells would meet constitutional requirements and standards promulgated by the American Correctional Association; (3) even with double-bunking, the purpose of the Consent Decree — to provide a constitutional jail for Suffolk County pretrial detainees — would be achieved; and (4) an unexpected increase in the number of detainees required the Sheriff to double-bunk in order to effectively administer his duties under the law.

The District Court, in a Memorandum and Order issued on April 9, 1990, denied the Sheriff's Motion to Modify the Consent Decree, rejecting the Sheriff's argument that the constitutional standards governing the conditions of confinement of pretrial detainees had changed since the Consent Decree was entered by virtue of the United States Supreme Court's decision in *Bell* v. *Wolfish*. The District Court stated that *Bell* did not directly overrule any legal interpretation on which the 1979 Consent Decree was based. App. 10a.

Applying the strict standard for modification of consent decrees as set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the court rejected the Sheriff's argument that increases in the pretrial detainee population committed to his

custody justified the proposed modification. App. 10a-11a. The court noted that although other circuits had adopted a more flexible standard, the First Circuit had not. App. 11a. The court then purported to apply the "flexible standard" adopted by a majority of the circuits, but in reality, established an even more stringent standard then the *Swift* strict standard.

Under the flexible standard, the court reasoned that modification would still not be appropriate, because it would violate one of the primary purposes of the Consent Decree, that of providing "conditions of confinement" for Suffolk County pretrial detainees that "meet agreed-upon standards." One of those agreed-upon standards, the Court stated, was that only one inmate be held per cell. App. 12a. The Sheriff appealed the District Court decision to the First Circuit, which affirmed the decision below by order and judgment entered on September 20, 1990. This petition now follows.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court Should Settle the Split Between the Circuit Courts of Appeals and Determine What Standard Should Be Applied to Requests for Modification of Consent Decrees in Institutional Reform Litigation.

A. *The Majority of the Courts Have Applied the "Flexible" Standard to Requests for Modification of Consent Decrees in Institutional Reform Litigation.*

The Supreme Court should settle the split between the Circuit Courts of Appeals and determine whether the "grievous wrong" standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), or the more "flexible" standard adopted and recognized by a

majority of the Circuits applies to requests for modification of consent decrees in institutional reform litigation.

In *Swift*, the Supreme Court first considered the standard for the modification of consent decrees. In that case, the Court stated the circumstances under which a court may modify a consent decree, but in so doing made a sharp distinction between two types of decrees. The first it described as the "continuing decree . . . directed to events to come . . . [involving] the supervision of changing conduct or conditions [which] are thus provisional and tentative." *Id.* at 114. The second it described as an injunction granted to protect rights "fully accrued upon facts so nearly permanent as to be substantially impervious to change." *Id.* Where the latter circumstances prevail, the Court in *Swift* applied a strict standard permitting modification only upon a "clear showing of a grievous wrong evoked by new and unforeseen conditions." *Id.* at 119.

In *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), the Supreme Court relaxed the rigid standard of *Swift*. *United Shoe* presented the obverse situation of *Swift*. The government sought a modification of a consent decree because the decree had failed to achieve its purposes of establishing a "workable competition" among the manufacturers of shoe machinery. The Court held that *Swift* was not intended to prohibit all modifications, but only those sought by defendants to evade burdensome responsibilities. *United Shoe*, 391 U.S. at 248. It explained that application of a strict standard was appropriate in *Swift* because the defendants there had sought relief not to achieve the purposes of a consent decree, but to avoid them completely. *United Shoe*, 391 U.S. at 248, 249.

Within the past few years, however, a less demanding standard for modification of consent decrees has emerged in the lower courts in institutional reform litigation. This new "flexible standard" finds its genesis in the dichotomy created in

Swift between the two types of consent decrees — those involving "changing conduct or conditions" and those involving facts "substantially impervious to change." *Swift*, 286 U.S. at 114. Although the Court in *Swift* defined two vastly different types of consent decrees, it only established a standard for modification for decrees in the latter category. The courts have since recognized that the standard of *Swift* does not apply to all consent decrees.

> While adhering to the *Swift* principles that a modification should not vitiate the decree and that the defendant bears the burden of establishing the reasons supporting an alteration, several courts and commentators have asserted that the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification.

Ruiz v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (citations omitted).

A majority of the circuits, the Second, Third, Fourth, Sixth, Ninth and Eleventh, have explicitly adopted the "flexible" standard, while the Fifth, Seventh and the D.C. Circuits have recognized or noted with approval this standard. *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 969-970 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983) (the court recognized that in institutional reform litigation, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, and held that the flexible standard applies to the modification of a consent judgment's limitation on the size of facilities in which patients of an institution for the mentally retarded could be placed, in view of the testimony of state officials and expert witnesses, and that modification would not be in derogation of the primary objective of the consent decree); *Philadelphia Welfare Rights*

Organization v. *Shapp*, 602 F.2d 1114, 1120-21 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (where defendant made good faith effort at compliance with a "complex ongoing remedial [consent] decree," but could not comply because of circumstances largely beyond its control, court had power to modify the consent decree); *Plyler* v. *Evatt*, 846 F.2d 208 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988) (court held that application of flexible standard is appropriate in institutional reform litigation, and vacated, as an abuse of discretion, district court's denial of state's request for modification of consent decree to allow double-bunking); *Nelson* v. *Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc) (court applied flexible standard to request for modification, allowing double-bunking at penal institutions); *Heath* v. *DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989) (in considering a request to modify a consent decree to change category of class of inmates to be double-bunked and to include women in that class, court applied a more flexible standard as adopted by other Circuits, holding that in the area of institutional reform litigation, consent decrees arrived at by mutual agreement of the parties involved are subject to a lesser standard of modification than that dictated by *Swift*); *Keith* v. *Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986) (court applied the flexible standard for modification of consent decrees to decree involving construction of freeway); *Newman* v. *Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984) (total compliance with consent decree regarding constitutional requirements of state prison is not necessary before requesting a modification; where "a consent decree involves the supervision of changing conduct or conditions and is therefore provisional, modification may be more freely granted"); *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861-862 (5th Cir. 1987) (in denying modification of consent decree regarding overcrowding of state prisons, the court, without adopting, recognized and applied the flexible standard as adopted by 2nd, 3rd, 4th, 7th and 11th

Circuits); *Donovan* v. *Robbins*, 752 F.2d 1170, 1182 (7th Cir. 1985) (in ERISA action brought by Department of Labor, court recognized the "modern" standard for modification of consent decrees as adopted by the 2nd and 7th Circuits); *Alliance to End Repression* v. *City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc) (judges who preside over institutional reform litigation should be guided by the emerging consensus in favor of modification "with a rather free hand") (quoting *Carey*, 706 F.2d at 970); *Twelve John Does* v. *District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988) (in denying motion to modify consent decrees establishing population lid on prison facility, court recognized the flexible standard as adopted by the 2nd, 3rd and 4th Circuits).

In all of the above decisions, the courts have taken the position, advanced by the petitioner here, that in the area of institutional reform litigation a more flexible standard for modification of consent decrees should apply. As stated by the Fourth Circuit Court in *Plyler* v. *Evatt*, "[a]lthough [cases following the *Swift* standard] may set a strict standard for modification of consent decrees between private parties, this standard is inappropriate in institutional reform litigation for 'the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification.'" *Plyler*, 846 F.2d at 212 (citations omitted).

B. The District Court and First Circuit have Articulated and Followed a New and More Stringent Standard for Modification of Consent Decrees that Forecloses the Possibility of Substantive Change.

The District Court and the First Circuit, in denying the request for modification of the Consent Decree, articulated a

new and more stringent standard that radically differs from the standard of *Swift* and the standard adopted by the majority of the circuits, which forecloses the possibility of substantive change in a consent decree. This departure from the accepted and usual course of judicial proceedings requires the Supreme Court to exercise its supervisory powers. Sup.Ct.R. 10.1(a).

In its decision, the District Court first purportedly applied the "grievous wrong" standard for modification of consent decrees under *Swift* and concluded that the Sheriff's request had not met that standard. App. 10a. In so doing, the District Court ignored and did not apply the distinction drawn in *Swift* between consent decrees involving "changing conduct or conditions"[2] and those involving facts which are "substantially impervious to change." *Swift*, 286 U.S. at 114.

The court then purportedly went on to apply the flexible standard to the request for modification (noting that the First Circuit has not adopted that standard), and concluded that even under this standard modification would not be appropriate. App. 11a-12a. Contrary to its assertion, the District Court applied a new and unprecedented standard which in no way resembles the flexible standard adopted by a majority of the circuits.

The flexible standard, as adopted by the majority of the circuits, sets forth three elements that a party seeking modification must meet: 1) establish some change in circumstances from the time the decree was negotiated and approved; 2) convince the court it has attempted to comply with the decree in good faith; and 3) demonstrate that the requested modification does not frustrate the original and overall purposes of the decree. *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1120-21. Without addressing the first two elements, the District Court purported to apply the third element of the flexible standard. However, in so doing, the District Court applied that element in a manner that is completely inconsistent with the manner that the other circuits have applied it.

[2]Consent decrees involving prison conditions are appropriately categorized as decrees involving "changing conduct or conditions." The courts have recognized that increases in jail and prison populations are both beyond the control of jail and prison administrators and unpredictable. *Nelson* v. *Collins*, 659 F.2d at 422; *Plyler* v. *Evatt*, 846 F.2d at 211. Here, the Sheriff was first provided with a prediction that the detainee population would be declining. When this proved inaccurate, the number of cells in the new jail was increased by forty-one per cent, from 309 cells to 435 cells. Only after construction of the new jail was underway did it become apparent that even this increase might not be adequate.

Unlike the other circuits, the District Court held that the proposed modification would violate one of the "primary purposes of the decree — to provide conditions for pretrial detainees that meet agreed-upon standards." App. 12a. These conditions, the court reasoned, include the conditions of their confinement, such as whether cells are double-bunked. In substance, the District Court held that virtually any change affecting the intended beneficiaries of a consent decree — here, the pretrial detainees — would change an "agreed-upon standard." In contrast, the other courts have allowed, under the flexible standard, a change in the agreed-upon standards which affect the intended beneficiaries, including a change from agreed-upon single-cell occupancy to double-bunking. In both *Plyler* v. *Evatt*, 846 F.2d at 215-16, and *Nelson* v. *Collins*, 659 F.2d at 429, for example, the courts held that consent decrees controlling new prison facilities were properly modified to permit double-bunking. *See also*, *Heath* v. *DeCoury*, 888 F.2d at 1110 (double-bunking of existing facility allowed).

In determining whether to grant a request for modification of a consent decree, a court applying the grievous wrong standard of *Swift* looks only to the consequences of not granting the modification. In applying the flexible standard, a court looks to changes in circumstances, the good faith efforts of the institutional defendant at compliance and whether the mod-

ification would frustrate the original purpose of the decree. Under both of these standards, a court evaluates a request for modification by looking to the actual consequences.

In contrast, the First Circuit here adopted a standard for evaluating a request for modification of a consent decree under which a court does not look to the effect of denying or granting the modification, but to the purely textual question of whether the modification requested is a change of an "agreed-upon standard" as set forth in the consent decree. This question is resolved not by examining the practical effect of the modification, as required by the grievous wrong and flexible standards, but by a comparative reading of the decree and the request for modification. If the comparative reading shows that what has been requested is a change in the manner in which the institutional defendant agreed to treat those whom the decree is intended to benefit — "an agreed-upon standard" — the modification must be denied without further consideration. The application of this standard is reflected by the District Court's refusal in rendering its decision to consider any of the voluminous evidentiary material submitted by the Sheriff to show that double-bunking inmates at the Nashua Street Jail was safe, met constitutional requirements and accepted correctional standards, and would still leave inmates in conditions of confinement that were better than other jails, whether double-bunked or not.

The District Court decision, thus, articulated a radically different standard than either the "flexible" or the *Swift* standard. Under its decision, any request for modification which would affect those whom the decree is intended to benefit would qualify as a request for a change in "agreed-upon standards," and would automatically be denied. Under this standard, no request for modification of a consent decree could be granted, except where it involved a purely peripheral matter. This standard is in direct conflict with both *Swift* and the

holdings of the majority of the circuit courts which have applied the flexible standard to allow substantive changes in consent decrees.

Rather than focusing on "agreed-upon" standards, the flexible standard as articulated by the other circuits focuses on whether the modification would frustrate the original or overall purpose of the decree. Hence, under this flexible standard, previously agreed-upon standards or principles could be modified in light of changed circumstances, assuming good faith on the part of the requesting party, so long as the modification does not frustrate the original or overall purposes of the decree. *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1120; *New York State Association For Retarded Children, Inc.* v. *Carey*, 706 F.2d at 907-71. As noted by the Ninth Circuit in *Keith* v. *Volpe*, 784 F.2d at 1460, the "modern [flexible] standard obviously leaves the administrating court a great deal of discretion, even to alter the substantive rights of the parties."

The modification requested here, double-bunking of 197 of the 453 cells, is consistent with the overall purpose of the Consent Decree to "provide, maintain and operate as applicable a suitable and constitutional jail for the Suffolk County pretrial detainees." App. 15a. The double-bunking of 197 cells would not affect or change the construction and operation of the jail as small modular units of thirty-four to forty cells rather than huge blocks of multiple tiers of cells. Nor would it diminish or change the function of the special service cells such as intake, administrative segregation, disciplinary segregation, infirmary, protective custody, psychiatric observation and suicide prevention, none of which would be double-bunked. In addition, all other architectural requirements would remain unchanged: an average thirty-five square feet of common area per detainee, a kitchenette, laundry for personal clothing, two color televisions, telephones, counseling and visiting rooms, law library and the indoor gym.

Although the majority of the circuit courts have applied the flexible standard in institutional reform litigation, the First Circuit applied the "grievous wrong" standard of *Swift* and a completely different standard which it mislabeled the "flexible standard." App. 12a. Thus, the First Circuit's decision in this case conflicts with the majority of the Circuits regarding which standard should apply to requests for modification of consent decrees, and creates a further split in the circuits by adopting yet a third standard. Certiorari should be granted on this basis alone. Sup.Ct.R. 10.1(a).

II. A Determination of the Standard to be Applied to Requests for Modification of Consent Decrees in Institutional Reform Litigation Would Aid the Lower Courts and Public Officials Who Have Entered into or are Considering Entering into a Consent Decree.

A determination of the standard to be applied to requests for modification of consent decrees in institutional reform litigation would greatly assist the District Courts and the Circuit Courts in reviewing such requests, and would assist public officials in determining whether to enter into such decrees where they may later seek modification. This is particularly true for jail and prison administrators, who are obligated to accommodate increasing numbers of inmates with limited resources, a circumstance both unpredictable and beyond their control.

Consent decrees are a widely used tool for settlement and efficient management of institutional reform litigation. The impact of the Supreme Court's decision in this area would be widespread, affecting public officials in a variety of contexts such as prison reform, institutional reform for the mentally retarded, state welfare beneficiaries, state and federal pro-

grams, FDIC disputes, labor disputes, ERISA issues, environmental litigation, employment discrimination suits and school desegregation cases. A clear statement from this Court is necessary to define the standard to be applied to requests for modification of consent decrees.

Jail and prison administrators particularly need the benefit of a flexible approach to modification, so as to be able to adapt those decrees to the burgeoning jail and prison population found across the nation. As the court in *Philadelphia Welfare Rights Organization* v. *Shapp* noted, without the benefit of a flexible standard in the unique area of institutional reform, public officials will be unwilling to enter into consent decrees as an effective mechanism to resolve complex disputes.

> An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality.

Shapp, 602 F.2d at 1120.

The present case squarely presents the question of which standard should apply to requests for modification of consent decrees. Given the importance of consent decrees in settling complex and intricate litigation, it is vital that parties entering into such decrees have a clear idea of the standards governing their subsequent modification. The confusion and disparity resulting from individual circuit courts applying differing standards threatens to minimize the utility of consent decrees as a means for resolving complex litigation.

As in *Rhodes* v. *Chapman*, 452 U.S. 337, 344 (1981), this Court should grant the Sheriff's petition for certiorari because of the importance of the question to effective jail and prison administration.

III. The District Court and First Circuit have Declined to Follow the Holding of this Court in *Bell*.

The District Court and the First Circuit declined to follow this Court's holding in *Bell* that the double-bunking of pretrial detainees is not *per se* unconstitutional.

The District Court decision stated that "*Bell* did not directly overrule any legal interpretation on which the 1979 Consent Decree was based, and in these circumstances it is inappropriate to invoke Rule 60(b)(5) to modify a consent decree." App. 10a. The District Court is mistaken in this assertion.

The goal of the Consent Decree is "to provide a 'suitable and constitutional jail.'" The Consent Decree also states that the Architectural Program, which describes cells as "single occupancy rooms," sets forth "a program which is both constitutionally adequate *and constitutionally required*." App. 16a. (Emphasis added.) What constitutes a "suitable and constitutional jail" materially changed with the Supreme Court's ruling in *Bell* that double-bunking is not *per se* unconstitutional. This Court's ruling in *Bell* directly overruled that portion of the Consent Decree which asserts that "single occupancy rooms" are "constitutionally required." App. 16a.

Thus, the First Circuit's decision conflicts with the holding and progeny of *Bell*, and the petitioner's Writ of Certiorari should be granted pursuant to Sup.Ct.R. 10.1(c).

CONCLUSION

This Petition for a Writ of Certiorari should be granted because:

1. The First Circuit Court of Appeals and the majority of the other circuits have applied different standards to requests for modification of consent decrees in institutional reform litigation;

2. The First Circuit has also articulated and applied a new standard for modification of consent decrees that forecloses the possibility of substantive change;

3. The split in the circuit courts as to the standard to be applied to requests for modification of consent decrees in institutional reform litigation should be resolved to provide guidance to the lower courts and to public officials who are bound by such decrees or may be contemplating entering into such decrees;

4. The First Circuit failed to follow this Court's holding in *Bell* that double-bunking is not *per se* unconstitutional.

Respectfully submitted,

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December 17, 1990

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 90-1440

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
Plaintiffs, Appellees,

v.

DENNIS J. KEARNEY, ET AL.,
Defendants, Appellants.

SHERIFF OF SUFFOLK COUNTY,
Defendant, Appellant.

No. 90-1569

INMATES OF THE SUFFOLK COUNTY JAIL,
Plaintiffs, Appellees,

v.

DENNIS KEARNEY, ET AL.,
Defendants, Appellants.

COMMISSIONER OF CORRECTION, ET AL.,
Defendants, Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before
Campbell and Torruella, *Circuit Judges*,
and Caffrey,* *District Judge*

September 20, 1990

*Of the District of Massachusetts, sitting by designation.

Per curiam. This is an appeal from the United States District Court for the District of Massachusetts. The issue presented for review is whether a consent decree governing the Suffolk County Jail and House of Correction should be modified to allow inmates to be housed two per cell. The district court held that circumstances had not changed sufficiently to justify modification of the consent decree. *Inmates of the Suffolk County Jail* v. *Kearney*, 734 F. Supp. 561 (D. Mass. 1990).

We are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 90-1440

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
Plaintiffs, Appellees,

v.

DENNIS J. KEARNEY, ET AL.,
Defendants, Appellants.

No. 90-1569

INMATES OF THE SUFFOLK COUNTY JAIL,
Plaintiffs, Appellees,

v.

DENNIS KEARNEY, ET AL.,
Defendants, Appellants.

COMMISSIONER OF CORRECTION, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered September 20, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/_____
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 71-162-K

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
Plaintiffs

v.

DENNIS J. KEARNEY, ET AL.,
Defendants

MEMORANDUM AND ORDER

April 9, 1990

KEETON, R.E.

Before the court is the motion of the Sheriff of Suffolk County, pursuant to Fed.R.Civ.P. 60(b)(5) and (6), to modify the April 9, 1979 consent decree between the parties in this case to the extent of permitting double-celling of inmates in 197 of the 316 regular male housing cells at the new Suffolk County jail at Nashua Street.

I.

This suit was brought in 1971 by inmates of the old Suffolk County jail at Charles Street. The inmates alleged that the incarceration of pretrial detainees in the Charles Street Jail violated the Constitution. The Charles Street Jail was originally designed to house one prisoner per cell, but it was the practice

at the time this suit was brought to double-cell prisoners. In his June 20, 1973 opinion and order, Judge Garrity held that

> [a]s a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is "punishment" of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial: and therefore it violates the due process clause of the Fourteenth Amendment.

Inmates of Suffolk County Jail v. *Eisenstadt*, 360 F.Supp. 676, 686 (D.Mass. 1973). The very first element of relief in the final judgment entered by Judge Garrity pursuant to his opinion was a permanent injunction against double-celling at Charles Street Jail. *Id.* at 691. Defendants were also enjoined from holding any detainees at the Charles Street Jail after June 30, 1976. *Id.*

Defendants were unable to produce a plan for a new jail within the time set by the court. By order of June 30, 1977, Judge Garrity set a firm date for the closing of the old jail. While an appeal of that order was pending before the First Circuit, plaintiffs informed the Court of Appeals that they would agree to a further delay in exchange for an enforceable commitment by the defendants to adopt and execute a plan for construction of a new jail, within a reasonable time and according to specified criteria. The Court of Appeals adopted this proposal and stayed the order closing the old jail until March 3, 1978, to give the parties an opportunity to submit a plan.

The parties were unable to reach an agreement by March of 1978. The Court of Appeals then affirmed the order closing the jail, holding that if defendants did not submit an acceptable plan for a new jail by October 2, 1978, the Charles Street Jail would close on that date. *Inmates of Suffolk County Jail* v. *Kearney*, 573 F.2d 98, 101 (1st Cir. 1978). Defendants then filed a plan, which was approved by the district court, and which provided that the old jail could be used pending completion of the new one. In approving the plan, the court noted that

> the critical features of confinement, such as single cells of 80 sq. ft. for inmates are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards.

October 2, 1978 Memorandum and Order at 2-3.

On May 7, 1979, the court approved a consent decree among the parties embodying this plan. The preamble to this decree noted the desire of all parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design," and that the design for the new facility set forth "a program which is both constitutionally adequate and constitutionally required." Consent Decree at 2.

The original plans for the new jail provided for 309 single occupancy cells, to be used for both male and female detainees. During the years following the entry of the consent decree, however, the average number of detainees committed to the Sheriff's custody was increasing. The parties realized that the projections of the detainee population on which the original plans were based were flawed, and that a jail with a larger

capacity would be needed. After litigation in the state courts, defendants were ordered to build a larger jail, *Attorney General* v. *Sheriff of Suffolk County*, 394 Mass. 624, 477 N.E.2d 361 (1985), and this court approved a modification of the consent decree to allow the defendants to increase the capacity of the new jail. One of the conditions for approval of the modification was the maintenance of single-cell occupancy in the revised designs of the new jail. Order of April 11, 1985.

The new jail is now near completion and should be ready for occupancy later this spring.

II.

The Sheriff relies on the provision of Fed.R.Civ.P. 60(b)(5) authorizing modification of a judgment if "it is no longer equitable that the judgment should have prospective application." This portion of the rule codifies the standard set out in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), which dealt with a court's inherent power to modify.

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

This standard has been consistently followed in the First Circuit. *See Fortin* v. *Commissioner of Massachusetts Department of Public Welfare*, 692 F.2d 790, 799 (1st Cir. 1982). The Sheriff contends that "new and unforeseen conditions" are an alleged substantial and material change in the law regarding the constitutionality of double-bunking and in the operative facts regarding the continuing increases in the Suffolk County pretrial detainee population.

The Sheriff contends that since the consent decree was entered the constitutional standards governing the conditions of

confinement of pretrial detainees have been clarified by *Bell* v. *Wolfish*, 441 U.S. 520 (1979), decided by the Supreme Court one week after the court's approval of the consent decree eleven years ago. In *Bell* the Supreme Court held that the double-bunking practice in effect at the Metropolitan Correctional Center ("MCC") in New York City did not deprive pretrial detainees confined there of their liberty without due process of law. The Court held that the proper inquiry in determining the constitutionality of conditions of pretrial detention was whether the conditions amounted to punishment; the Court found on the record before it that the practice did not amount to punishment. Inmates were confined to cells of approximately 75 square feet of floor space for seven and one-half hours each night. *Id.* at 541. Over half of the unsentenced detainees spent less than ten days at the MCC, three-quarters were released within a month, and more than 85% were released within sixty days. *Id.* at 524-25 n.3. The Court did not hold that double-celling could never be unconstitutional, and observed that "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment. . . ." *Id.* at 542.

The cells proposed for double-bunking in the new jail are close in size to those in the MCC: 70 square feet. The Sheriff's proposal is to confine the inmates to their cells for twelve hours per day, eight hours at night and four hours during the day. The parties have provided different statistics on the length of time detainees are being held at the old jail. The Sheriff relies on length of stay statistics from January 1, 1988 through May 31, 1989, showing that approximately 25% of the inmates are released within two days of being committed and 50% within eight days. Defendant's Exhibit 38. Plaintiffs respond

that these statistics fail to account for the entire population, and that the "Count of Active Population, by length of stay, effective 9/25/89," prepared by the Sheriff's Department, showed that 32% of the population had been held for more than sixty days, and 14% for more than 120 days. Plaintiffs' Exhibit I-O; Plaintiffs' Memorandum of Law at 15.

The conclusion in *Bell* that the conditions of confinement at the MCC did not violate the Constitution necessarily depended on all of the facts and circumstances of that case. As described above, the conditions of confinement proposed by the Sheriff in this case can be distinguished from those in the MCC. *Bell* did not directly overrule any legal interpretation on which the 1979 consent decree was based, and in these circumstances it is inappropriate to invoke Rule 60(b)(5) to modify a consent decree. *See Coalition of Black Leadership* v. *Cianci*, 570 F.2d 12, 16 (1st Cir. 1978). A party uncertain as to whether the law would require the results proposed to be included in a consent decree can withhold consent, and appeal the decision of the district court if it holds against that party. *Id*. I conclude that defendant has not established a change in the law of the kind that would satisfy the standard of Rule 60(b)(5).

The Sheriff also argues that continuing increases in the Suffolk County pretrial detainee population justify the proposed modification. However, the overcrowding problem faced by the Sheriff is neither new nor unforeseen. It has been an ongoing problem during the course of this litigation, before and after entry of the consent decree, from the time the population projections on which plans for the new jail were based were recognized to be inaccurate, resulting in a modified plan for a larger-capacity jail, through the construction of sixty modular cells at the site of the old jail in 1987, and through a request to permit double-celling in those modular units, denied by this court in January 1989. Various measures have been adopted to

deal with the problems of overcrowding while still remaining in compliance with the consent decree, including transfers to state prisons, bail reviews by the Superior Court, and a pretrial controlled release program. The Sheriff contends that it only became apparent at the end of 1988 that the new jail's capacity would be inadequate, and that by then construction was underway and the design could not be modified, as it had already been once before, to add more cells. However, this motion was not filed until July 1989. Although it is conceded by all parties, and accepted by the court, that increases in jail populations are difficult to predict and are beyond the control of the Sheriff, it nevertheless appears that there has been a marked upward trend in the number of inmates held in the Sheriff's custody since 1985. I conclude that modification is not warranted on these grounds.

Defendant urges that this court apply a more flexible standard for modification, as some circuits (although not the First Circuit) have suggested is appropriate when a decree stems from litigation aimed at institutional reform. *See Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Nelson* v. *Collins*, 659 F.2d 420 (4th Cir. 1981); *Plyler* v. *Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 241 (1988). This standard would permit modification of a consent decree even if a defendant cannot establish the unforeseen change in circumstances required by *Swift*. Under this standard a court may grant a modification if a defendant establishes that some change in circumstances has occurred from the time the decree was negotiated and approved and that the defendant has attempted to comply with the decree in good faith, and if the modification requested does not frustrate the original overall purposes of the decree. *See Carey*, 706 F.2d at 969-

70; *Philadelphia Welfare*, 602 F.2d at 1120-21. I conclude, however, that even if I were to apply the flexible standard requested by the Sheriff, modification would not be appropriate. The proposed modification would violate one of the primary purposes of the decree — to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this litigation — perhaps even the most important element. Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential. The type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree. The difficulties faced by the defendants in complying with that decree, which this court does not minimize, may understandably lead them to regret some of the terms of the decree, but "[r]egret intensified upon reflection is not . . . cause for modification." *Fortin*, 692 F.2d at 800.

The Sheriff has also moved for relief pursuant to Rule 60(b)(6), which allows relief from judgment for "any other reason justifying relief." The Sheriff argues that his proposal for double-celling complies with constitutional standards. Even if this were true, which it is not necessary to decide, it does not provide a basis for relief from a consent decree. To permit relief on this basis would make settlements in cases of this type worth very little. It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by a court that induces participation in it. Defendants' agreement in this case was a firm one, and not merely an agreement to comply with the decree if it was not too difficult to do so, or to comply with

the decree until it arguably required more of the defendants than the absolute minimum they would be constitutionally required to provide. It was an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination of the issue of constitutionality. The terms of the consent decree, as agreed to by all the parties long ago, and as modified when it was appropriate to do so, will continue in effect.

The Sheriff has argued vigorously that in ruling on the present motion the court should weigh, as a factor favoring modification, the likelihood that the Sheriff will be unable to house all detainees committed to his custody and that release of some pretrial detainees may result. This argument must be rejected. If indeed a release of pretrial detainees results from the denial of this motion for modification, that result will have been brought about by choices made by fiscal authorities of the County and the Commonwealth. It is not a legally supportable basis for modification of a consent decree that public officials having fiscal authority have chosen not to provide adequate resources for the Sheriff to comply with the terms of the consent decree, except by requesting permission from other Commonwealth officials for release of pretrial detainees who otherwise would have been held in custody. This court's authority is limited by the established legal requirements for modification, and those requirements have not been met in this case.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

The Motion of the Sheriff of Suffolk County for Modification of the Consent Decree is denied.

A conference is scheduled for June 13, 1990 at 3:30 p.m. to determine if it is appropriate, upon occupancy of the Nashua Street facility and transfer of all persons in the plaintiff class from the Charles Street Jail to the Nashua Street facility, to enter Final Judgment in this case, and, if so, in precisely what form.

_____

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 71-162-G

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
Plaintiffs,

v.

DENNIS J. KEARNEY, ET AL.,
Defendants.

CONSENT DECREE

Whereas the defendants Sheriff of Suffolk County and Master of the Suffolk County Jail ("county defendants"), Mayor of the City of Boston and Boston City Councillors ("city defendants") and the Massachusetts Commissioner of Correction desire to fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees;

And whereas the defendants desire to continue to house pretrial detainees at the existing "Charles Street Jail" until a constitutional replacement can be provided;

And whereas the plaintiffs desire that, as soon as possible, all present and future members of the class, including persons who will later become inmates of the Suffolk County Jail, will not be exposed to unconstitutional conditions of pretrial confinement;

And whereas all parties desire to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design;

And whereas all parties agree that for the purposes of this litigation the Suffolk County Detention Center, Charles Street Facility, Architectural Program which is attached and, as modified in paragraph 3 below, incorporated in this decree, sets forth a program which is both constitutionally adequate and constitutionally required.

It is therefore stipulated and agreed that it shall, and it hereby is ORDERED, ADJUDGED AND DECREED, that:

1. The defendants shall construct, maintain and operate as applicable a new facility for the detention of both males and females who are committed to the custody of the defendant Sheriff prior to and pending their trials and de novo appeals.

2. Said facility will be constructed on the present location of the Charles Street Jail.

3. Said facility shall be designed and built according to the standards and specifications contained in the "Suffolk County Detention Center, Charles Street Facility, Architectural Program" dated January 1, 1979, attached hereto and incorporated in this decree with only the following modifications:

(a) The first full sentence on page 2 is changed to read:

> "In the course of doing this it may be found that certain portions of the present jail must be demolished for new construction, or that with renovation the existing structure can be used. The building will be renovated and reconstructed where necessary to achieve the program."

(b) The following paragraph is added to page 2a:

> "*Fire Safety*. The design and construction will meet the standards set out in the 1976 edition of the Life Safety Code of the National Fire Protection Association (publication 101-1976)."

(c) The following is added to page 7:

> "A.4.c. Staff toilet. 100 sq. ft."
>
> Lines A.1.a. through A.4.c., inclusive, on page 7 are in the Outside Administration area.

(d) The paragraph headed "A.1.a. Lobby/reception" on page 8 is changed by increasing the number of visitor lockers to one-hundred (100) and the tenth sentence in that paragraph is changed to read:

> "Lobby should include public telephones, drinking fountain, vending machines and bulletin boards."

(e) The following sentence is added to A.6.b., Records storage/clerical, on page 10:

> "Inmates should have no access into the administration area in which the records are located. The records storage area itself should be physically secure and all access to it controlled and supervised."

(f) The following sentence is added to A.9.c., Staff/Locker/Shower Female, on page 12:

> "Staff lockers shall be provided for all uniformed personnel. The staff locker room shall contain adequate shower and toilet facilities, and staff lockers shall be of a size adequate to accommodate the storage of civilian clothes, uniforms, and all necessary security equipment."

(g) The following line is added under "Infirmary" on page 31:

"E.1.q. Kitchenette 60 sq. ft."

(h) Section E.3.b on page 31 is changed to read:

"E.3.b. Non-contact visiting 100 sq. ft."

(i) Pages 34 and 35 are deleted.

(j) The following paragraph shall be added to page 37:

"Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

(k) The third sentence of section F.1.a. on page 39 is changed to read:

"Artificial lighting shall be sufficient for reading purposes, no less than 30 foot candles at desk level shall be provided."

(l) The following sentence is added to section F.1.a on page 39:

"The cell shall contain an electric outlet."

(m) The following sentence is added to section F.1.c. on page 39:

"Dayrooms shall be designed, insofar as possible, to provide both small and large spaces, and to facilitate simultaneous use for varied activities, both quiet and noisy."

(n) The second sentence on page 41 is changed to read:

"Although exceptions may arise from scale considerations, all services and amenities should remain the same as for the male housing units."

(o) The following paragraph is added to page 41:

"Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

(p) The following paragraph is added to page 43:

"Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

(q) The following sentence is added to the last paragraph on page 46:

> "The law library will contain at least the materials on the American Association of Law Libraries' Special Committee on Law Library Services to Prisoners' 'Checklist Two.'"

(r) The last sentence of the second paragraph on page 50 is changed to read:

> "Design emphasis should be on developing exercise areas with good sun exposure and on maximizing the area available."

(s) Section L.1.a. on page 55 is changed to read:

> "Chapel (64 persons) 600 sq. ft."

(t) The fourth sentence on page 56 is corrected to read:

> "Specific furnishings and special needs should be identified during the design phase."

4. The city, county and state defendants shall without delay take all steps reasonably necessary to carry out the provisions of said Architectural Program as modified according to the following schedule:

Existing Conditions Documentation	4 weeks
Review	2 weeks
Preliminary Design	18 weeks
Review	4 weeks
Design Development	14 weeks

Review	4 weeks
Working Drawings	26 weeks
Review (Official)	4 weeks
Bid and Award Contract	10 weeks
Total	86 weeks

5. In carrying out the Architectural Program the defendants shall not change or depart from it in any substantial way except with the assent of the parties or the approval of the Court.

6. While designing and executing construction in accordance with the Architectural Program the defendants shall address explicitly its effect upon: the inmates currently lodged at the Charles Street Jail and the conditions of their confinement; jail administration, including working conditions; and safety and security at the Jail. Programs and schedules shall contain subdivisions dealing with this subject. Pretrial detainees shall continue to be held at Charles Street Jail pending further order of the court.

_____

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_____

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_____

Richard Hynes
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Theodore Tedeschi
Attorney for Sheriff of Suffolk County
and Master of Suffolk County Jail

Approved: _____
United States District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 71-162-G

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
Plaintiffs,

v.

THOMAS S. EISENSTADT, ET AL.,
Defendants.

OPINION AND ORDER

June 20, 1973

GARRITY, Jr., District Judge.

This action arises under 42 U.S.C. § 1983 and jurisdiction is based on 28 U.S.C. § 1343(3), (4). Plaintiffs, named inmates of the Suffolk County Jail in Boston, Massachusetts (otherwise known as, and hereinafter referred to as, the Charles Street Jail) sue on their own behalf and on behalf of all inmates at Charles Street Jail as a class. Defendants are the Sheriff of Suffolk County, who has primary custody and control over the facility; the master of the jail, who has ongoing responsibility for its daily operation; the Commissioner of Correction for the Commonwealth of Massachusetts; and the Mayor and nine City Councillors for the City of Boston.[1] Primarily at issue

[1] Under Mass.G.L. c. 34, § 4, the Mayor and Councillors are county commissioners for Suffolk County and as such have executive as well as legislative powers. See, e.g., c. 34, § 14. Therefore the county's duty to provide "a suitable jail," c. 34, § 3, is partly the responsibility of the Mayor and City Councillors.

is whether incarceration of unsentenced inmates in this facility contravenes the Eighth and Fourteenth Amendments, although First and Sixth Amendment allegations are also involved.

The history of this litigation reflects a spirit of cooperation by the parties and their counsel with each other and with the court, resulting in submission of two stipulated partial judgments which were entered by the court on June 2 and July 6, 1972 and which improved conditions at the jail in many important respects and substantially narrowed the issues to be resolved. (Copies of these partial judgments appear as appendices A and B to this opinion.) Among other matters treated therein are the elimination from use of certain isolation facilities, promulgation of disciplinary rules and procedures, increase of the number of visits per week, and limitations upon the reading and censoring of mail by jail officials. In addition, the parties submitted a lengthy stipulation of undisputed facts, so that the greater part of the trial could be profitably devoted to expert testimony.

Trial on the merits covered parts of six days. Testimony was received from thirteen witnesses, including the defendants sheriff and master and the deputy master of Charles Street; Warren A. Worth, senior jail inspector for the Federal Bureau of Prisons; James V. Bennett, former Director of the Federal Bureau of Prisons; and various expert witnesses on such subjects as diet and nutrition, health care and facilities, and structural and architectural deficiencies. The record also includes voluminous documentary evidence, including official reports and written statements of experts on several aspects of the jail and approximately 30 affidavits of inmates (where inmates are quoted in footnotes to this opinion, it will be from their affidavits received in evidence and marked as exhibits). In addition, with the full cooperation of jail officials, the trial judge and his law clerk took a view of nearly every area of the facility and, without advance notice, stayed overnight in a cell.

The findings of fact herein are based on the stipulation and documents, the testimony, and the court's personal observations.

The relief sought by plaintiffs, beyond that already afforded in the consent partial judgments, falls generally within two categories. One line of requested relief, premised upon the cruel and unusual punishment provision in the Eighth Amendment and the due process clause of the Fourteenth Amendment, focuses upon alleged constitutional defects in the quality and level of incarceration and is specifically based upon such things as structural inadequacies, poor plumbing, space limitations, inadequate diet and health care, inadequate exercise and recreation, and inadequate provision for personal hygiene, all of which, plaintiffs claim, have a pernicious, deleterious effect upon the physical and mental health of inmates. A second line of requested relief, premised generally upon plaintiffs' status as detainees rather than convicts and specifically upon First and Sixth Amendment considerations, seeks to provide plaintiffs with greater access to counsel, family and friends, and books, magazines and periodicals.

FINDINGS OF FACT

1. Charles Street has been in continuous use since about 1848. It was originally constructed to house one prisoner per cell.[2] Cells for male inmates are in three wings, east, north and south. Centered in each wing, such that the exterior walls of the building are about 15 feet away from the cells, is a cell

[2] The National Council on Crime and Delinquency in its report "The Suffolk County, Massachusetts, Jail, a Survey" made to the Finance Commission of the City of Boston in 1968 (hereinafter referred to as the NCCD Report) at p. 4.04 stated, "[t]he housing of two men in a cell is a practice that is condemned by all authorities in the operation of adult detention facilities."

block which extends from floor to ceiling, i.e., there are no floors separating one tier or level of cells from another. Passage along each tier above ground level is by means of a catwalk, comparable to an outdoor fire escape, which leads to a central staircase at the end of the cell block. The catwalks on the side wings are connected to the catwalks on the long row. Each block consists of five tiers and has cells back-to-back on both sides, all facing an outer wall. The east wing (or long row) has 12 cells on both sides of each tier; there are four cells on both sides of each tier of the north and south wings. Of 180 cells for men, only 142 are considered operable; the rest, largely due to defects in the locks and plumbing, are not in use. A fourth, or west, wing houses administrative offices, medical facilities, and an auditorium used at various times as a chapel, theatre and recreation area. All four wings meet at an open, central rotunda.

2. The cells have four walls of stone; three of them are solid; the fourth wall, nearest the catwalk, has two openings, one a barred (and sometimes screened) window-like opening and the other a heavy, barred (and sometimes screened) door which swings on large hinges. The walls are cracked and flaked with repeated coats of paint; the floors are of composition tile; the walls and floor are damp and clammy. There are no heat outlets in the cells; heat is circulated by means of blowers at the end of the tiers; upper tier cells are extremely hot in the summertime and lower ones frigid in cold weather.[3] Cell size is approximately 8′ wide x 11′ long x 10′ high, and was designed and constructed for single occupancy. Nearly all of the usable floor space in cells is taken up by two iron-slatted cots which have no springs, are covered by old, worn and often soiled mattresses which have no protective covers and

[3] Inmate Chatman: "Since it is winter, I have to sleep with my clothes on at night, and still I'm always cold. It is so cold that the puddles which form on the floor after it rains start to form a thin sheet of ice on the top."

are in deplorable and unhealthy condition. The area between the cots is not sufficient to allow two men to pass each other. It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal friction.[4] On either end of one of the cots there is open floor space approximately 1-1½ feet wide; however, there is no unused floor space at the head and foot of the second cot, one end being taken up by the toilet and the other by a metal, quarter-circular slab built into the wall, which is the only surface available for either storage or writing. The only other furnishings are a sink with cold running water, a few wall pegs for hanging clothes and an unshaded, 60-watt light bulb which is built into the wall at the end of the cell nearest the catwalk and is controlled from outside the cell.

3. The plumbing system is antiquated, inadequate and impossible to repair economically and, as testified by James V. Bennett, "positively repulsive." Ruptures, leaks and flooding frequently occur in "the flats" (an area on the bottom level of the east wing where inmates eat their meals) and in the pump room (sub-basement) beneath the jail. There are major leaks in the boiler room ceiling. There are leaky ceiling pipes (both for water and heat) in the kitchen which sometimes drip directly onto food about to be served. Toilets and sinks in the cells are corroded, filth-encrusted and often a serious health hazard. Toilet bowls are not covered and many have no seats. The water in the toilets is at a level with the bottom of the bowl; the water does not partially fill the bowl as in modern public health code toilets. Flush valves in the toilet units are old and in need of repair or replacement, causing the toilets and sinks

[4] On July 12, 1972 an inmate was beaten to death by his cellmate, who had beaten a previous cellmate in May 1971. Despite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy cells; it also is evidence of the need for a system of classifying prisoners.

to get plugged up and to overflow frequently.[5] Usually when this happens, the cells must be closed but some cells remain in use despite leaking toilets and sinks. A fecal smell emanates from many toilets. This attracts bugs and other insects. There is no hot water in the cells; in the shower room, on some mornings there is no hot water at all, while on other days the water is scalding, because the cold water pressure is low.

4. The jail as a whole poses a serious fire hazard. In case of fire, removal of inmates can only be accomplished by unlocking each cell door individually. The only fire escape in the entire jail consists of a single steel ladder running from the fifth tier down to the first tier of the east wing. The ladder is enclosed in a steel mesh shaft and exits onto the corridor at the far end of the east wing. Since there is only one staircase per cell block, at the near end, i.e., closest to the rotunda, officers must unlock all doors on each tier, then retrace their steps in order to descend to the next lower tier. Most of the electrical current in the jail is direct current. It is necessary each year to repair, overhaul and convert several direct current motors at great expense. At present there is no emergency back-up electrical generator. In the Sheriff's 1971 Supplementary Budget Request No. 59 (p. 4, 3/4/71), it is stated that "in the event of an electrical power failure at the jail due to fire or other catastrophe, the consequences will most assuredly be disastrous because of the inexcusable lack of an emergency power generating system."[6]

[5] When we spent the night there, the wall valve serving as a faucet for the sink in our cell jammed while the water was running and we narrowly averted a flood by bailing the overflowing sink into the toilet with a small paper cup while our law clerk freed the valve, after several unsucessful attempts, by hammering on it with the heel of his shoe.

[6] Former inmate Sewell: "Electrical power often breaks down at the jail, particularly in the early morning. It is not unusual for four or five fuses to blow out in a single day."

5. Mosquitoes are a serious year-round problem. Roaches and waterbugs are prevalent. Rats are a serious, continuing problem. There is a recurrent problem of pigeons roosting inside the main jail, although programs of extermination and window repair periodically eliminate them.

6. There is a din which persists 24 hours a day which includes noise from radios, noise made by drug addicts and alcoholics during withdrawal[7] and steam pipes banging during cold weather. Since the cells are open, save for bars and sometimes screens, and there are so many stone and metal surfaces, noise made in any part of the main jail can be heard throughout the tiers. This makes sleeping extremely difficult.[8]

7. The women's section contains one cell block with four tiers on each side, ten cells to a tier.[9] The top two tiers and approximately half of the second tier are not used. The floor of the women's shower room is cracked, buckled and concave — apparently caving in. There are two bathtubs but one is not usable. There are six showers, three of which were not usable as of February 1, 1972. As of April 1, 1972, only one shower was operable. The shower room ceiling is cracked and the plaster corroding. The women's section cells are 6′ x 11′. Each contains one spring bed on a frame, a toilet, a sink and a small table. The paint on the walls is peeling and the wall

[7] Former inmate DiRocco: "All night the jail sounds like a nuthouse. All the junkies are screaming their guts out going through cold turkey."

[8] On the night of the court's visit (the inmates were unaware of our return to spend the night), the noise seemed to increase after midnight and approached a virtual bedlam which lasted until dawn. At least a dozen radios, tuned to various rock music stations, seemed to be turned up to full volume; and for hours from a nearby cell, whether above or below we couldn't tell, a deep-voiced inmate, evidently deranged, shouted an obscene, incoherent monologue, beginning, "Ah want mah beer, you hear? Ah want mah beer . . .," over and over like a broken record.

[9] Inmate Martin: "Sewage pipes run between the tiers on the women's side. They leak sewage, creating a terrible stench, which is worse when it rains outdoors."

plaster is corroding. The women's sewing room has a major ceiling corrosion due to water seepage, which causes an unsafe working area. There is one fire extinguisher per tier in the women's section. There are no fire hoses.

8. During the past quarter century, seven separate governmental commissions studied Charles Street and condemned it. Most of them recommended that it be abandoned and a new facility constructed. The governmental agencies either sponsoring or conducting studies of Charles Street were the City of Boston (1949), a Governor's Committee (1962), the Municipal Research Bureau (1962), the Finance Commission (1963), the Redevelopment Authority (1946), the National Council on Crime and Delinquency (1968) and a Special Legislative Study Commission (1970). The latest of the studies recommended that a jail be included in a proposed new county courthouse complex, thereby decreasing the security problems inherent in transporting prisoners to the courts. Although the jail serves Suffolk County, which includes Chelsea, Revere and Winthrop, its costs are borne solely by the City of Boston. Unfortunately for the plaintiffs and their predecessor inmates, the more the jail was condemned, the more reluctant the City became to invest substantial funds in what appeared to be a doomed structure.

9. Since January 1, 1970, the average male population of Charles Street has been approximately 340,[10] comprising an average of about 290 detainees awaiting trial and about 50 sentenced prisoners, most of the latter committed to short terms for public drunkenness. Since January 1, 1970, the average female population has been 20-25. The average time spent by detainees awaiting trial in Suffolk Superior Court is from five to six months, except that detainees charged with capital offenses customarily wait from eight months to a year or longer.

[10] The NCCD Report, see *supra* n.2, concluded that an average daily population in 1966 of 208 inmates constituted severe overcrowding.

There is no classification program at the jail, i.e., no systematic effort is made to develop comprehensive information about an inmate and apply this information to cell assignments[11] (except that juveniles are kept together) and individualized program planning.

10. The majority of inmates, men and women, committed to the jail are in need of some kind of medical attention. An estimated 60% of the inmate population were drug users prior to admission. At the time of the trial, the medical staff at the jail consisted of two full-time nurses and a doctor who spent from one-half to three hours per day, Monday through Friday, at the jail. No trained staff were on duty between 6 P.M.-8 A.M. or on weekends. Funds have since been obtained for two additional nurses and one has been hired. A routine physical examination or health screening interrogation is not administered to inmates upon admission, nor are inmates designated to work in the kitchen given physical examinations. Special diets are not provided inmates with diabetes or other diseases which require special diets, although such inmates would be allowed to have special foods brought in to them. For heroin withdrawal, tranquilizers (librium), anticonvulsants (dilantin) and barbiturates (phenobarbital) are used.[12]**

11. Many inmates have mental problems which are aggravated by the cramped quarters and enforced idleness. Eugene J. Balcanoff, M.D., the Suffolk County Court psychiatrist, testified as to serious difficulties encountered by illiterates, inmates unable to tolerate inactivity and inmates suffering from impulse disorders in maintaining their mental stability while awaiting trial.[13]** The doctor testified that, except in repeat

[11] Former inmate Trainor: "Alcoholics were put in my cell several times. They always smell, and very often they throw up all over the cell."

[12] Inmate Marson: "The reality of being confined in a tiny cell with another person for 21 hours each day can be maddening. The idleness and lack of privacy affects all of us mentally, and often leads to depression. Within a space of only five weeks, three separate cellmates of mine have attempted to commit suicide."

offenders, the level of anxiety and apprehension in pretrial detainees is extremely high, higher than in prisoners after sentence; and that being locked up for 19 hours a day is damaging to their mental condition. Yet there is little psychiatric treatment available to the inmates. For the most part it must come from the nurses who, though highly competent generally, do not have the training to handle mental problems.

12. Food is served in half-hour shifts. It is prepared and served only by sentenced inmates, mostly alcoholics, because only sentenced inmates have work details. Detainees do not have work details. No medical personnel or anyone else trained in health inspects the kitchen facilities and food storage area. There is no dining hall or cafeteria; presumably when the jail was built it was planned that a prisoner be fed in his cell. Inmates eat in the ground level corridors on picnic tables which are lined end to end on either side of the long row and immediately adjacent to the cells along that tier.[14] Inmates occupying these cells may be locked in while other inmates are eating. The food is prepared in a basement kitchen and carried in cauldrons and pans up one flight of stairs to "the flats" area of the first floor where it is dispensed from containers within a steam table which is inoperable. This results in a substantial number of inmates receiving food that is cold. In addition, since the food lies open on trays in a serving area which is located below stairways and catwalks, which the prisoners use en route to meals, dirt from their shoes and from these stairways is kicked loose and floats down onto the food. The nutritional value of the meals served is generally adequate, although deficient in total calories and vitamin A.

[14] Inmate Johnson: "The benches on which we have to sit are often wet and dirty. Garbage is on the floor next to the dining area, and the silverware is usually dirty." Former inmate Trainor: "Once I found a cigarette butt inside a meatball I was eating." Inmate Martin: "On March 19, I found a worm in my mashed potatoes."

13. Clothing is issued to sentenced inmates only. Occasionally, detained inmates may obtain needed clothing if they request it. Inmates are permitted by the rules to send their shirts out to be cleaned once per week; but in practice this service is available must less frequently and shirts sent to the laundry are often lost. There is no other laundry service. However, soap is issued and inmates interested in clean clothing may compete for the use of the one sink located on each tier.[15] There is no systematic program for keeping cells clean and sanitary, either during occupancy or between occupancies, although the means for doing so are available to inmates. Occupied cells are nearly all dirty.

14. Inmates are released from their cells for only four and one-half hours on the average day, one and one-half hours of which are for meals. In the remaining three hours of free time, an inmate may stand in line in order to shower and shave, wash out his clothing, purchase articles from the commissary[16] or go on sick call. Waiting lines generally form for each of these activities, making it improbable that an inmate could do more than one of these things during any given free-time period. At irregular intervals ranging from every sixth day to about once every three weeks, an inmate is also released for a one and one-half hour recreation period in the evening. On Sundays, inmates are permitted to attend Chapel in the morning and may choose between free time and a movie in the afternoon. Recreation facilities are essentially two: the small yard of the jail, where volleyball, basketball and other forms of physical

[15] Former inmate Trainor: "There are only four hot-water sinks in the jail, one on each tier, and only two of them worked. In order to wash my clothes, I had to first go to the shower room to get soap, then wait my turn at the sink, and finally wash out my clothes. By this time, free time would be over. Then I had to somehow hang up my wet clothes to dry in my cell."

[16] Inmate White (16 years of age waiting for trial over 8 months): "On several occasions the line for the canteen has been so long that I have had to wait until the next day to buy what I wanted."

exercise are available on a very limited basis during the warmer months (approximately April 15 to November 15), and the chapel, which contains a bumper-pool table, two billiard tables, a television, a ping-pong table, a pinball machine, and a badminton net. There is no organized program of physical exercise.

15. During the daytime shift (8 A.M.-4 P.M.) there are nine officers on duty who are given cell block assignments. Of these, two men are assigned to cover each of the first four tiers and one man is assigned to cover the fifth tier. In other words, with the exception of the officer assigned to the fifth tier, each officer has responsibility for one whole tier of the north or south wing plus one side of an east wing tier. During each of the two nighttime shifts, there are four or five officers on duty, one being assigned to cover each tier. Since the average male inmate population is approximately 340, staff limitations are partly responsible for the limited time allowed inmates out of their cells.

16. Since entry of the second partial judgment in these proceedings on July 6, 1972, inmates are permitted three visits a week, each to last one hour when possible. Visits are limited to adult members of an inmate's immediate family; friends and children may only visit if special permission is obtained. Each visit may be with as many as two people. Visiting hours are Monday through Saturday, 9:15 A.M. to 10:50 A.M. and 1:00-3:30 P.M.

17. Attorneys may visit client inmates as frequently as necessary, but such visits may only occur between 9:00-11:00 A.M. and 12:00 noon-4:00 P.M., Monday through Saturday. Attorneys may visit after 5:00 P.M. only if special permission is obtained. Attorneys may not visit on Sundays or holidays. Attorneys may send law students to interview in their stead. Joint conferences of inmates and attorneys with outside witnesses or codefendants would be permitted by jail officials, provided arrangements are made in advance.

18. In contrast to the conditions of confinement at Charles Street Jail, convicted offenders housed at state correctional facilities may visit with attorneys at any reasonable hour including evening hours without special permission. Attorneys may visit on any day, including Sundays and holidays. Inmates at state institutions may receive three visits a week, from friends and children as well as from adult family members. Each visit is for the duration of visiting hours, which range from two to three hours.

19. All state prisoners occupy single rooms or cells. They generally are locked in or required to be in their cells between 10:00 P.M.-6:00 A.M. but, except for headcounts, are not required to be in cells during the rest of the day and evening. State prisoners may have televisions and radios in their cells and are permitted to watch television every day or night.

20. Inmates in all state institutions are given clean clothes as needed. Free laundry service for all clothing is available at least once weekly. Inmates may ordinarily pay to have more frequent laundry service. Every state inmate is given a complete physical examination upon admission to a state institution.

CONCLUSIONS OF LAW

During the past few years, due largely to the courage of young poverty-program lawyers, the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience. The traditional "hands-off" doctrine, holding that federal courts are powerless to interfere with the operation of state and county correctional institutions, see *Eaton* v. *Bibb*, 7 Cir., 1955, 217 F.2d 446, 448, *cert. den.* 1955, 350 U.S. 915, has slowly yielded to the broader principle stated by Judge Murrah in *Stapleton* v. *Mitchell*, D.Kan. 1945, 60 F.Supp. 51, 55, "We yet like to believe that wherever the

Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, . . ." Twice last year the Supreme Court reversed lower federal court decisions dismissing state prisoner complaints because they were thought by the lower courts to be in the area that should be left "to the sound discretion of prison administration" and ordered that the complaints be heard on the merits. *Haines* v. *Kerner*, 1972, 404 U.S. 519, and *Cruz* v. *Beto*, 1972, 405 U.S. 319, commenting *per curiam* in the latter case, at 321, "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons', which include prisoners."[17]

It is almost impossible to say anything about the national shame of America's prisons that has not been said before; and we shall not try. The final report of the 42nd American Assembly, a national, non-partisal [*sic*][18] educational institution, following its December 17-20, 1972 meeting on "Prisoners in America", stated among other things:

> Most correctional institutions are and can be no more than mere warehouses that degrade and brutalize their human baggage. . . . Local jails are even worse than prisons. These cages of steel and concrete are a national disgrace. In them standards of humanity and decency are violated, and the presumption of innocence which is so basic to American justice is ignored.

[17] This is not to say, of course, that state courts lack jurisdiction to grant relief. *Comm. ex rel. Bryant* v. *Hendrick*, 1971, 444 Pa. 83, 280 A.2d 110, 113-114. But they have done so infrequently.

[18] Participants at the December 1972 meeting included elected public officials from federal, state and local governments, clergymen, corrections commissioners, newspaper editors, law school deans and professors, and representatives of business and labor; including former Commissioner Jerome G. Miller of the Massachusetts Department of Youth Services and Sheriff John J. Buckley of Middlesex County.

Many interested persons are unaware that prisons are relatively new in the history of penology[19] and were established as a hopefully humane alternative to punishments such as banishment, flogging and mutilation. D. Rothman, *The Discovery of the Asylum* (1971). Having read a fair number of court opinions and scholarly articles on the subject of current prison conditions and their baleful consequences both to individual inmates and to the community, we think that a serious argument could be advanced for a return to the old system.[20] Charles Street Jail is by no means the worst of American prisons and jails. See, e.g., *Holt* v. *Sarver*, E.D. Ark., 1970, 309 F.Supp. 362, describing the Arkansas State Penitentiary system, and *Collins* v. *Schoonfield*, D. Md., 1972, 344 F.Supp. 257, dealing with the Baltimore City Jail. Nevertheless, in spite of radical improvements in the operation of the jail made by agreement of the parties on the threshold of the trial,[21] the Charles Street Jail remains so bad that the 42nd American Assembly might well have been writing about it when stating, "Local jails are even worse than prisons."

Another factor bearing upon our decision is the backlog of criminal cases pending in the Massachusetts Superior Court for Suffolk County, causing delays of several w eks to several

[19] "The history of penology is the saddest chapter in the history of civilization. It portrays man at his worst. His cruelty, brutality and inhumanity are unrestrained through most times in most places. Virtually absolute power over nearly helpless people has often wholly corrupted." R. Clark, *Crime in America*, 212 (1970).

[20] If prisons generally are so evil, one might reasonably ask, "Except where mandatory, why do judges participate in the devastating process by imposing jail sentences?" Obviously a judge may answer this question only for himself, and the following over-simplified attempt is personal and the use of "we" strictly editorial: we have considered incarceration necessary for the protection of society and been influenced, perhaps subconsciously, by the pagan maxim, "Necessity knows no law except to conquer."

[21] These improvements were incorporated in two partial judgments in these proceedings dated June 2 and July 6, 1972 and entered with finality pursuant to Rule 55(b), Fed.R.Civ.P., on July 7; and appear as appendices to this opinion.

months before a defendant unable to make bail receives a trial. The situation reflects a puzzling refusal by a majority of Massachusetts legislators to increase the size of the state trial court. During the past five years, chief justices of the Superior Court and bar association officers have made annual pilgrimages to legislative committees, seeking increases in the number of Superior Court judges and staff, justifiable by every national standard of judicial administration. The total annual cost to the Commonwealth of the increases sought would be less than the cost of constructing a single mile of superhighway. Yet since 1967 the legislators have turned a deaf ear.

The relevancy to these proceedings of the logjam of criminal cases in the Superior Court for Suffolk County lies in the fact that approximately 85% of the population of the Charles Street Jail have not been convicted of the crime for which arrested. They are waiting to be tried. Although Charles Street houses a small percentage of sentenced misdeameanants — most for drunkenness — for all practical purposes the facility is a detention center. Cases dealing with facilities which are principally employed as pretrial detention centers have held uniformly that "their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished. . . . The purpose of incarceration . . . was simply detention in order to assure presence at trial. Punitive measures in such a context are out of harmony with the presumption of innocence." *Anderson* v. *Nosser*, 5 Cir., 1971, 438 F.2d 183, 190; see *Brenneman* v. *Madigan*, N.D. Cal., 1972, 343 F.Supp. 128, 135-136; *Collins* v. *Schoonfield, supra* at 265-266; *Hamilton* v. *Love*, E.D. Ark., 1971, 328 F.Supp. 1182 at 1191; *Jones* v. *Wittenberg*, N.D. Ohio, 1971, 323 F.Supp. 93, 100. Punitive measures are also out of harmony with the Fourteenth Amendment to the Constitution, which forbids the deprivation of liberty without due process of law. Although restraints on liberty are required to assure the presence at trial of persons

unable to make bail or charged with capital offenses, such restraints must be circumscribed to include only those which are absolutely necessary. As in any case where precious personal liberties are affected, the state bears the burden of justification.

"Punishment" cannot be justified without a judicially-determined finding of guilt; in other words, pretrial detainees may not be "punished" for crimes charged against them but not yet proved against them. If a pretrial detainee is incarcerated in worse circumstances than the convict who is being "punished", it is difficult to say that the detainee is not also being punished. "It is clear that the conditions for pretrial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." *Hamilton* v. *Love, supra* at 1191. See also *Jones* v. *Wittenberg, supra* at 100. Thus the first test of the constitutional sufficiency of incarceration at the Charles Street Jail rests on a comparison between the quality of that incarceration and the quality of the type of incarceration which the state designates "punishment" in a correctional facility for convicts.

A second test employs traditional analysis long applied in due process and equal protection cases. The court must first identify the interest which the state seeks to advance by incarceration. It must then consider the means applied to secure this interest and determine whether they are rational and necessary. If a detainee is subjected "to gratuitous and wholesale deprivations of rights which are unrelated to insuring his presence at trial," *Brenneman* v. *Madigan, supra,* at 137, the due process clause is violated. In other words, limitations on the liberty of a detainee must be measured against the state's sole interest in presenting him for trial. And "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly

achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 1960, 364 U.S. 479, 488, quoted in *Brenneman* v. *Madigan, supra*, at 138.

As a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is "punishment" of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment.

Before elaborating on this finding, certain observations are warranted. First, we find little to criticize in the efforts of the named defendant-officials to enhance and make tolerable the quality of Charles Street Jail. All parties concede that substantial improvements have been made in recent years. In many areas, notably in the medical staff, prisoners are attended by dedicated, competent personnel. This is not a case where a court might say, with some innuendo, that defendants' efforts were "too little, too late"; considering the obstacles, their efforts have been commendable. But these obstacles, beginning with the antique and obsolete structure itself and including budgetary limitations upon such things as staff size and program planning, render real improvement impossible.

To follow the problem to its source inevitably illuminates a second consideration which the defendants, especially the mayor and city councillors, have firmly pressed upon us through counsel. Both the testimony and our own personal observations lead us to conclude that constitutional requirements cannot be satisfied without construction of a new jail and, more immediately, the addition of staff. Without question, this will impose an economic burden upon the taxpayers of Suf-

folk County, which may, however, be lessened by selling the valuable three acres of land on which the jail stands.[22] But it is fundamental that a deprivation of constitutional rights may not be justified upon economic considerations. See *Rozecki* v. *Gaughan*, 1 Cir., 1972, 459 F.2d 6, 8; *Jackson* v. *Bishop*, 8 Cir., 1968, 404 F.2d 571, 580; *Brenneman* v. *Madigan, supra*, at 139. Moreover, there is no need in this case to rely solely on legal principles to support a judgment which will have widespread cost ramifications. For years, the consensus in this community, from commissions and experts making in-depth studies of the facility to passing citizens struck by its archaic and forbidding exterior, has been to condemn the use of the jail. In 1968, in a report entitled "The Suffolk County, Massachusetts, Jail: A Survey," the National Council on Crime and Delinquency wrote:

> "The physical plant of the Suffolk County Jail is antiquated, insufficiently secure for high risk prisoners and does not provide decent housing arrangements for any of its prisoners. The facility is a relic of the past. It cannot be remodelled to provide a modern adult detention program. Even if certain aspects of the jail (the kitchen facilities, the plumbing system, the power plant) could be totally renovated and made more adequate, these improvements would still not touch at the core problem of the physical plant. . . . The Suffolk County Jail should be replaced . . ."

No one in the entire course of this proceeding has stated a contrary view. In our opinion, no one could. The failure to date to replace the jail is reflective of political inertia. It does not reflect a debate in the community over the need for a replacement facility.

[22] In 1964, the Boston Redevelopment Authority estimated the value of the site to be at least $2,000,000. Since then the surrounding area has been much improved and developed and real estate values have risen sharply.

The factual basis for this opinion readily appears in our findings of fact. Briefly, an inmate at Charles Street who merely stands accused spends from two to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cellmate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away. He passes his confined hours in a dank, decrepit room, often smelling of human excrement, usually in clothes which he cannot keep clean, and able to see nothing outside the cell except parts of the catwalk and outside wall. His mental stability may be affected. His food is often cold and dirty and must be eaten in a corridor that cannot be kept clean. In the three or four hours a day outside his cell, he has few opportunities for meaningful physical exercise, effectively none in the colder months. Recreation of any kind is severely limited.

A comparison drawn between this confinement and that of sentenced inmates in Massachusetts state facilities reveals that it is punitive in fact, if not in theory, and also that this type of confinement is unnecessary to the basic interest of the state in pretrial incarceration. No less than pretrial facilities, correctional facilities have a strong interest in security; but the correctional authorities of Massachusetts do not find single cell occupancy and long hours of free time out of cells inconsistent with security requirements. If anything, single cell occupancy, by reducing the number of inmates to be controlled, would enhance security at Charles Street. Although we recognize that more free time places heavier burdens on staff, and may require hiring of additional staff, it is in no way inherently inconsistent with security, given adequate staff and planning. More important, it is consistent with the due process requirement that a presumptively innocent man's right to personal mobility be

curtailed only to the extent warranted by the state's interest in confining him.

In our view, shared by other courts dealing with conditions of pretrial detention, this type of case is more appropriately analyzed under the due process clause of the Fourteenth Amendment than under the cruel and unusual punishment provisions of the Eighth Amendment. See, e.g., *Brenneman* v. *Madigan*, *supra*; *Jones* v. *Wittenberg*, *supra*. Nevertheless, certain of the considerations that adhere to the Constitution's prohibition of cruel and unusual punishment apply here and merit brief discussion. First, what amounts to "cruel and unusual" at a given point in time reflects "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 1958, 356 U.S. 86, 101. A facility such as this, "constructed in an era when the only purpose of the jail was to keep people locked up," Jail Survey at 4.15, may, with the passage of time, cease to meet the community's standards of humane treatment, particularly as people learn more about the goals and problems of penology. Assuming that the sense of the community is reflected in the quality level of conditions of confinement of convicts, as to which some harshness may be justified on theories of deterrence and retribution, it is reasonable to believe that that sense would be offended by a facility housing presumptively innocent persons, as to whom theories of deterrence and retribution are inapplicable,[23] the quality level of which is grossly inferior to that afforded convicts.

Convicts in Massachusetts penal and correctional institutions are cared for and treated much better than inmates at the Charles Street Jail. With respect to cell space, sanitation, food, medical care, educational programs and recreation, there is really no

[23] This is, of course, not to say that restraints on a detainee's liberty may not be imposed, nor that punitive steps may not be taken, if the detainee poses a threat to the security or order of the institution.

comparison. Parenthetically, even at Charles Street, the convicted misdemeanants are treated better than the detainees. The former are issued clothing; the latter are not. The former are given work assignments; the latter are not.[24] Thus constitutional assessment of the jail under the Eighth Amendment confirms our conclusion under the Fourteenth. True, such an analysis can be carried too far. It does not mean that new correctional and penal institutions may not be constructed or old ones renovated because they might thereby become less confining and punitive than certain decrepit detention centers within the same system. It does mean, however, that prisoners awaiting trial, to whom the science of penology and programs of rehabilitation are not technically applicable, may not constitutionally be made the orphans of criminal jurisprudence whose degradation may be ignored because they are merely charged with criminal offenses rather than found guilty of them.

The irony of the situation of pretrial detainees is apparent. Their condition should be of relatively slight concern to the law because so temporary. Under the Sixth Amendment they "enjoy the right to a speedy trial" and presumably in the near future they will move along, either to prison after conviction or to freedom after acquittal. Too often, of course, this happens in the far future. Meanwhile a plausible theoretical basis for postponing concern for their civil rights remains. In the instant proceedings, the irony has been compounded by the extent of the deterioration of Charles Street: a series of experts' reports commencing in 1949 concluded that it was too antiquated to be renovated; accordingly the City felt that any capital improvements would be wasted and, from at least 1949 to 1969, only emergency repairs were authorized.

[24] Senior Inspector Worth of the Federal Bureau of Prisons testified that the defendant jail officials are mistaken in their impression that unsentenced prisoners may not be compelled to work or to keep their cells clean. No one challenged this testimony.

Regarding the central effect of our order, namely, the elimination and replacement of the present facility, it has been the considered judgment of everyone who has critically evaluated the jail, including some of the defendants in this case, that it has long since outlasted its serviceability. Granted, a layman initially might view this abstractly as a concurrence among "experts" based upon academic predispositions concerning penology. However, to draw upon the language of Mr. Justice Marshall concurring in *Furman* v. *State of Georgia*, 1972, 408 U.S. 238, 362, "whether a substantial proportion of American citizens would today, if polled, opine that [this facility] is barbarously cruel" is of less importance than "whether they would find it to be so in the light of all information presently available. . . With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens." In concluding that Charles Street must be replaced, the court has judged it against a standard of basic humanity toward men innocent in the eyes of the law, not against abstract standards of sociological, psychological and penological preference; and we believe on the basis of the testimony and other evidence in these proceedings that most citizens, if they knew the facts firsthand, would reach the same result.

As for other types of relief requested in plaintiff's proposed order, in principle nearly all of it should be granted. Realistically, however, much of it is rendered impractical by the physical limitations of the facility itself. For example, the food preparation and serving facilities are not sufficiently flexible to provide for special diets; nor are there facilities for adequate exercise. These and other factors must be considered in the planning and staffing of a replacement facility, and such a facility must be adequate to afford inmates free time and recreational alternatives comparable to those enjoyed by sentenced inmates. Until such a facility has been acquired or constructed,

however, the court will not impose requirements upon a jail that is inadequate to provide them.

At the same time, certain improvements are feasible within the limitations of the Charles Street Jail and will be ordered. In view of additions already authorized, and in part already made, to the medical staff, it is reasonable and essential that any inmate remaining at the jail over seven days be given a complete physical examination, as is the practice in state correctional facilities. Complete physical examinations must also be given all kitchen workers and food handlers. In the interests of personal hygiene, institutional clothing must be issued to all inmates who need it and full free laundry service must be provided for all inmates at least once a week. It will also be ordered that mail from a Massachusetts attorney may be opened for inspection only in the presence of the inmate to whom addressed, thereby bringing defendants' practice into compliance with *Smith* v. *Robbins*, 1 Cir., 1972, 454 F.2d 696, 697.

Certain other relief not inconsistent with the physical facility but arguably beyond present staff limitations must be provided now, even if this requires the hiring of some additional personnel. See *Wyatt* v. *Stickney*, 1972, M.D. Ala., 344 F.Supp. 387. Visits with counsel, for example, are presently limited to hours when counsel are least available to utilize them. In view of the requirements of the Sixth Amendment and the fact that in state facilities, where the need for counsel is far less than pretrial, counsel may visit at any reasonable hour including evenings without obtaining special permission, visiting hours for counsel at Charles Street must be expanded (no change will be ordered in visiting hours for law students assisting counsel, as to whom present regulations are reasonable). Similarly, there is no rational reason other than staff limitations why detainees should not have at least one additional hour away from their cells during daylight hours, although lighting

defects make this impractical at night from a security standpoint; nor for the elimination of afternoon free time on Tuesdays and Saturdays.

It is also consistent with the physical limitations of the jail that, after a reasonable time within which to make necessary arrangements and changes, it be converted to single cell occupancy for detainees during the period while a new facility is being constructed or acquired. This conversion may be accomplished in part by increasing the number of usable cells. There are approximately 38 cells not currently in use because of defective locks or plumbing; some of them may be made habitable. In all likelihood, it will require a reduction in the number of detainee prisoners. Plaintiffs have argued that defendants have a number of means at their disposal, short of refusing further commitments,[25] whereby the population of Charles Street may be reduced. Without vouching for the practicability of the means suggested, several of them merit serious consideration by the defendants. Sentenced inmates, typically serving short sentences for drunkenness and who may continue to be confined two per cell, may be transferred to the Suffolk County House of Correction at Deer Island or to other state or county institutions. Some pretrial detainees may be lodged in adjacent counties or with state authorities. Juveniles may be transferred to the Division of Youth Services. Women inmates may be transferred to M.C.I. Framingham, thereby permitting most of the women's section, now under utilized, to be closed to women and converted to use by male inmates and personnel.[26]

[25] "If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons." *Hamilton* v. *Love*, *supra* at 1194.

[26] A small part of the women's section would continue to be used for women prisoners, but only as a commitment receiving station from which women sentenced to definite terms of less than two years would routinely be transferred to M.C.I. Framingham. The women's section could not be closed entirely without in effect precluding Suffolk County judges from imposing jail sentences of less than two years on women offenders. See Mass.G.L. c. 279, § 18.

Finally, no later than November 30, 1973, when detainees will be occupying cells singly and overcrowding of the common areas will have been lessened, two additional orders shall become effective. See *Brenneman* v. *Madigan, supra* at 141, and *Collins* v. *Schoonfield, supra* at 279. First, age and family relationship restrictions on visitors to detainees will be removed, except that visits by particular persons may be denied for reasons of security. Secondly, defendants shall arrange for the installation of a sufficient number of pay telephones, which shall not be wiretapped or monitored in any way, to permit detainees to make at least one telephone call daily.

In other respects, except where afforded by the two partial judgments already entered, the relief sought by plaintiffs is denied.

FINAL JUDGMENT

Upon the general finding that the Charles Street Jail stands in violation of plaintiffs' rights under the Constitution of the United States and the specific findings of fact and conclusions of law stated in the court's opinion, it is hereby ORDERED, ADJUDGED AND DECREED that:

Defendants Sheriff Thomas S. Eisenstadt, Master Harold V. Langlois, Commissioner John O. Boone, Mayor Kevin White and the Councillors of the City of Boston who are also County Commissioners for Suffolk County, their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, are permanently enjoined (a) from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial and (b) from housing at the Charles Street Jail after June 30, 1976 any inmate who is awaiting trial.

It is further ORDERED that as soon as practicable, no later than 30 days from the date of this order, defendants Eisenstadt and Langlois shall:

(1) provide complete physical examinations to all inmates who are to be confined in the Charles Street Jail for over seven days and to all kitchen workers and food handlers before assignment or reassignment to the kitchen or food serving areas.

(2) provide institutional clothing to all inmates who need it and free laundry service to all inmates at least once a week.

(3) provide that on every day of the week every inmate awaiting trial (unless confined to a cell for disciplinary reasons) have four hours of free time away from his cell, not including time spent at meals.

(4) not open mail from an attorney who is a member of the bar of Massachusetts except in the presence of the inmate to whom addressed.

(5) expand the regular hours for attorney-client visits to 8:00 P.M. on weekdays and from 9:00 A.M.-5:00 P.M. on Sundays and holidays.

It is further ORDERED that as soon as practicable, no later than November 30, 1973, defendants shall

(6) allow children and friends as well as adult relatives to visit inmates awaiting trial without special permission, except that visits by particular persons may be denied for reasons of security.

(7) provide for daily access to pay telephones, which shall not be monitored in any way, by inmates awaiting trial.

It is further ORDERED that defendants shall

(8) post inside the jail, in at least two places in the men's section and one in the women's section where they can be viewed by inmates, copies of this final judgment and the partial judgments dated June 2, 1972 and July 6, 1972 and keep them posted for at least ten days, and

(9) file with the Clerk, and serve copies on plaintiffs' counsel, progress reports as to (a) compliance with specific provisions of this final judgment and of the partial judgments and (b) steps taken to comply with provisions of this judgment to become effective in the future, the first such report to be filed on or before August 1, 1973.

The court shall retain jurisdiction in the case and enter further orders as may be required.

APPENDIX A

PARTIAL JUDGMENT

Complaint was filed in the above-entitled proceeding as a class action seeking declaratory and injunctive relief as to allegedly unconstitutional conditions and practices at the Suffolk County Jail, including the treatment of prisoners held in solitary confinement. After pre-trial conference, the parties have agreed to an order respecting certain aspects of the use of solitary confinement, having reserved other issues relating to discipline and solitary confinement for trial. Accordingly, without deciding whether the treatment and conditions which have existed in the past with respect to this matter have been unconstitutional, and the court having determined that there is no just reason for delay on this portion of the case, it is hereby ordered, adjudged, declared, and decreed that Defendant Eisenstadt and defendant Langlois, and their officers, employees, agents, successors and all persons acting in concert with them:

1. Shall not confine any inmate of the Suffolk County Jail in any of the solitary confinement cells (otherwise known as the "heavy solitary" or "isolation" cells) found in that portion of the jail known as the Gatehouse or in any of the padded

cells now located in the Gatehouse. Within a reasonable time after this order, the padded cells shall be dismantled and the solitary confinement cells so disabled as to make impossible confinement therein.

2. Shall not confine any inmate to any of the "light solitary" cells (otherwise known as "segregation" or "semi-solitary" cells) found in the Gatehouse unless:

> a. It is determined by the Disciplinary Committee that the inmate's conduct presents such a serious threat to the health and safety of other inmates and/or officers that it is necessary to remove him from the main jail. In any case in which jail officials desire to place an inmate in a "light solitary" cell during the evening shifts (4:00 p.m.-8:00 a.m.) the Disciplinary Committee shall be convened by 9:00 o'clock on the following morning.

And

> b. A jail officer is present at the Gatehouse at all times in which any inmate is confined therein.

3. Shall provide to all inmates confined to "light solitary" confinement cells in the Gatehouse or maximum security cells in other portions of the jail, or confined to their own cells for disciplinary purposes:

> a. The same diet as furnished to inmates in general population;
>
> b. A daily physical examination by the jail physician, including examination of temperature, heart and blood pressure as provided in the Massachusetts Rules and Regulations for Jails and Houses of Corrections, Rule 16;

c. A bed, mattress, blanket, adequate lighting, clothing, sink, toilet, toilet paper, soap, linen, and towel; provided however that if an inmate attempts to destroy the bed or uses the bed, linen or towel as a weapon, these items may be removed from the cell.

d. Writing materials, if desired.

e. Daily exercise outside of the cell.

f. A daily shower.

APPENDIX B

SECOND PARTIAL JUDGMENT

Complaint was filed in the above-entitled proceeding as a class action seeking declaratory and injunctive relief as to allegedly unconstitutional conditions and practices at the Suffolk County Jail. After pre-trial conference the parties agreed to enter into a consent order regarding certain aspects of solitary confinement, which order was entered on June 2, 1972 entitled "PARTIAL JUDGMENT." After evidentiary hearing in this case, but before any issues have been submitted to the court for decision, the parties have agreed to a further order respecting additional aspects of the case, leaving other issues to be decided by the court. Accordingly, without deciding whether the prior practices of the defendants have violated the constitution, or whether the matters set forth below are either constitutionally required or constitutionally sufficient in all respects, and the court having determined that there is no just reason for delay on this portion of the case, it is hereby Ordered, Adjudged, Declared, and Decreed that

Defendant Eisenstadt and defendant Langlois, and their officers, employees, agents, successors and all persons acting in concert with them:

1. Shall draft a revised and up-to-date Inmate Guide which shall include a) a comprehensive list of rights and privileges of inmates, described with enough specificity to prevent inconsistent application, arbitrariness, and favoritism in their implementation and, b) an explanation of all programs, work opportunities and services available to inmates. The Inmate Guide shall be promulgated by publication in English and Spanish, public posting within the jail, and distribution to each present inmate and all new inmates upon admittance. A copy of the Guide shall be available to any attorney, friend or family member of a jail inmate. The Guide shall be revised and republished on a regular basis.

2. Shall draft and promulgate a set of disciplinary rules and regulations, providing for offenses, penalties and disciplinary procedures. An inmate subject to disciplinary action shall be furnished with advance written notice of the charge; the right to call, confront and cross-examine witnesses; and written notice of decision.

3. Any inmate questioned by jail officials regarding the commission of any offense punishable by the criminal law shall first be informed that he has a right to remain silent, that anything he says may be used against him in a criminal proceeding, that he has a right to counsel and that if he does not have counsel, counsel will be appointed if he cannot afford it.

4. Shall permit (in addition to those matters covered in the first "PARTIAL JUDGMENT", ¶3) inmates confined to solitary confinement cells of any kind, confined to maximum security cells, or confined to their own cells for disciplinary reasons, to possess reading materials and to have correspondence to the same extent as members of the general population and to have visits with attorneys.

5. Shall not read or censor any inmate mail. Outgoing mail may be sealed when deposited for mailing and shall not be opened by jail officials. The number of letters shall not be limited.

6. Shall permit inmates to have three visits per week, each to last for one hour when possible.

7. Shall permit inmates to receive packages through the mail containing items which would be delivered if personally brought by visitors. These packages may be opened and searched for contraband. The list of permissible items shall be set forth in the Inmate Guide.

8. Shall inform all incoming detainees of their rights under M.G.L. c. 276, § 58 (as amended 1971); shall inform them that bail review petitions are available upon request; and shall fulfill all the other requirements of M.G.L. c. 276, § 58.

9. Shall permit any inmate to have individual, private consultations with outside clergymen, including but not limited to Protestant, Catholic, Jewish and Muslim priests, ministers or rabbis. A clergyman may be required to produce credentials verifying his (or her) bona fides.

10. Shall make every effort to recruit and hire more Spanish-speaking personnel, so that staff members fully conversant in both Spanish and English are available to Spanish-speaking inmates during all shifts.